MOTION FILED
NOV 16 1988

(6)

NO. 88-658

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

PANHANDLE EASTERN PIPE LINE COMPANY,
Petitioner,

v.

STATE OF ILLINOIS, *ex rel.* NEIL F. HARTIGAN,
Attorney General of the State of Illinois,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA

Pursuant to Rule 42 of the Rules of this Court, the Interstate Natural Gas Association of America ("INGAA") respectfully moves for an order permitting it to file a Brief as *Amicus Curiae*. In support of its motion, INGAA would show:

1. INGAA is a Delaware corporation with its principal place of business in Washington, D.C. INGAA is a non-profit trade association whose membership is comprised of virtually all of the major interstate natural gas transmission companies operating in the lower forty-eight states. INGAA's member companies, one of which is Petitioner, account for approximately ninety percent of all natural gas transported and sold in interstate commerce. INGAA's membership also includes large Canadian interprovincial pipelines which are regulated by the National Energy Board of Canada.

2. Petitioner has raised a question which affects all interstate natural gas pipelines and which therefore affects INGAA. The decision of the court below is incorrect and is adverse to the interests of interstate natural gas pipelines. The Brief that INGAA requests permission to file argues that, because of state regulation, the first purchaser rule of *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977), works perfectly when applied to the interstate sale of natural gas to regulated distribution companies. Allowing direct purchasers to recover antitrust damages eliminates the various problems which the Supreme Court's *Illinois Brick* rule was designed to avoid and at the same time the regulatory process will assure that a proper allocation is made of any damage recovery between the direct purchaser and its customers. Thus, there is no need to permit indirect purchaser suits in contravention of *Illinois Brick.*

3. In view of the importance of the question presented in this case, INGAA sought the consent of both Petitioner and Respondent to file its Brief as *Amicus Curiae.* While Petitioner indicated its willingness to consent. Respondent declined to do so. Petitioner's letter of con-

sent is being filed contemporaneously. INGAA files this motion for leave to present its views on this question which it believes may not be fully or adequately presented by the parties. INGAA has an interest in this case that reflects the interest of natural gas pipelines that sell to local distribution companies subject not only to regulation by the State of Illinois but also to similar regulatory jurisdictions in all of the lower forty-eight states, with the exception of Vermont. INGAA's members are also subject to regulation by the Federal Energy Regulatory Commission. INGAA is therefore in an ideal position to present a brief as *Amicus Curiae* dealing with the broad applications of the issue presented. INGAA is also interested in this case because its members are subject to circuit court interpretations of *Illinois Brick* that conflict with the Seventh Circuit's.

For the foregoing reasons, the Interstate Natural Gas Association of America respectfully requests that this Court grant leave to file its Brief as *Amicus Curiae* at or before the time set for the filing of the brief of the Respondent.

Respectfully submitted,

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QUESTION PRESENTED

Should this Court's holding in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which bars antitrust suits by indirect purchasers, apply to a *parens patriae* and class action suit brought on behalf of the customers of a regulated public utility when the remedy for an antitrust injury can be more appropriately dealt with in an action brought by the direct purchasing utility?

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BRIEF OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA AS AMICUS CURIAE

I

INTEREST OF AMICUS CURIAE

INGAA is a nonprofit trade association whose membership is comprised of virtually all of the major interstate natural gas transmission companies operating in the lower

forty-eight states. INGAA's membership also includes large Canadian interprovincial pipelines which are regulated by the National Energy Board of Canada. INGAA's U. S. member companies, one of which is Petitioner, account for approximately ninety percent of all natural gas transported and sold in interstate commerce. INGAA's U. S. member companies, like Petitioner, sell to local distribution companies in all of the lower forty-eight states except Vermont. These local distribution companies are subject to the jurisdiction of their respective public service commissions. The Seventh Circuit misapplied the Supreme Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), as it applies to pipelines that sell to local distribution companies regulated by state public service commissions. The Seventh Circuit's ruling, which sanctions antitrust suits by indirect as well as by direct purchasers against interstate pipelines, creates a serious risk of multiple recoveries against the pipelines and complex damage tracing problems in such suits—the two dangers that the *Illinois Brick* court sought to eliminate. INGAA is deeply concerned with the possible adverse consequences of this ruling, especially in view of the fact that its members are subject to conflicting interpretations in other circuits. Its interest here is to help persuade the Court that such adverse consequences can and should be avoided as the Seventh Circuit's ruling is contrary to *Illinois Brick*.

II

SUMMARY OF ARGUMENT

INGAA's argument does not address the merits of the underlying suit against Petitioner nor does it concede that antitrust recovery is warranted in this case. Its argu-

ment instead addresses how the *Illinois Brick* rule ought to apply in this case, assuming for the sake of argument only that an antitrust injury is proved. The direct purchaser rule of *Illinois Brick* works perfectly when applied to the interstate sale of natural gas to regulated distribution comanies. Such companies have a significant incentive under applicable regulatory guidelines to seek to recover antitrust damages for overcharges that have been passed on to their customers. Equally important, the regulatory process will assure that a proper allocation is made of any damage recovery between the direct purchaser and its customers more effectively than will a *parens patriae* or class action. Thus, under the circumstances, there is no need to permit indirect purchaser suits in contravention of *Illinois Brick*.

III

ARGUMENT

Illinois Brick is one of the Supreme Court's most controversial decisions. Since that decision, every Congress has been subjected to numerous attempts to amend or modify the *Illinois Brick* rule. *See* Comment, *The Indirect Purchaser's Right to Sue Under Section 4 of the Clayton Act: Another Congressional Response to Illinois Brick*, 32 Am. U.L. Rev. 1087, 1111-21 (1983). Thus far, Congress has refused to legislate a change in the rule.

The principal political and academic objection to *Illinois Brick* has been that an indirect purchaser may suffer a substantial injury that will not be remedied because only the direct purchaser may recover. This objection has no validity when the direct purchaser is a

regulated utility, however, because in the event of an award, the utility would be required to return any award to its customers. In the instant case, the Seventh Circuit recognized that if Central Illinois Light Company ("CILCO"), the direct purchaser, recovered from Petitioner, it would be required to return the overcharges to its customers, the indirect purchasers. Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit ("Appendix") at A-6, 7. But, instead of concluding that this was a better case for the application of *Illinois Brick,* because any consumer injury would not go unremedied, the Seventh Circuit reached the opposite conclusion—that *because* CILCO's customers ultimately would benefit, CILCO would have no incentive to sue. The Court stated:

> The public utility has less to gain from suit than the direct purchaser in the case of the purely private contract. The public utility commission may force the utility to pass on to the consumers any and all damages that the utility recovers, and if it does, utilities will have no incentive to sue because they will have nothing to gain from suit.

Appendix at A-6, 7. In reaching the conclusion, the Court assumed without foundation and incorrectly that CILCO would not have sufficient incentive to pursue overcharges that were passed on to its customers. The Court also apparently failed to consider that a suit by CILCO would be a more desirable alternative for compensating CILCO's customers than would a *parens patriae* or class action suit, the mechanisms through which CILCO's customers would recover in this case.

A. REGULATION BY THE ILLINOIS COMMERCE COMMISSION INSURES THAT CILCO WILL SEEK COMPENSATION FOR ANY OVERCHARGES.

There is no basis for the Seventh Circuit's conclusion that CILCO would not pursue a lawsuit to recover the alleged overcharges. CILCO has sued to recover the very same overcharges that are sought in this case. *See* Appendix at F-1-27. This fact alone belies the Seventh Circuit's conclusion. Equally important, the applicable regulatory framework encourages a utility in the position of CILCO to bring suit. In the case of Illinois, the Illinois Commerce Commission is charged with reviewing utility rate schedules to assure that they are just and reasonable. Ill. Rev. Stat. ch. 111-2/3 ¶ 9-101-252 (1987). A utility's rates must be just and reasonable. *Id.* at ¶ 9-101. In addition, under purchased gas adjustment clauses, such as CILCO has in place, the Illinois Commerce Commission holds annual public hearings to determine whether the utility's gas purchase costs are prudent. *Id.* at ¶ 9-220. The utility has the burden of establishing the prudence of its purchases. *Id.* Because gas purchased at unlawfully inflated prices could not be deemed to be prudently incurred, CILCO would be required to refund any overcharges. *Id.* Thus, CILCO has a very real economic incentive to pursue a lawsuit to recover any overcharges.

It makes little sense to predicate a general rule of standing on speculation that public utilities will not act in accordance with their regulatory obligations. The assumption should instead be that they will act lawfully, and the rule of standing determined accordingly. In this case, CILCO has an incentive to sue and has sued. As

Judge Cudahy, in his concurring opinion, recognized "[u]nder the practical facts of regulation CILCO would ordinarily have a greater incentive to bring this litigation than economic theory suggests." Appendix at A-15. The application of *Illinois Brick* should be guided by these facts.

B. A RECOVERY OBTAINED BY CILCO WOULD COMPENSATE CILCO'S CUSTOMERS MORE EFFECTIVELY THAN A RECOVERY BY THE STATE OF ILLINOIS.

Since it is plain that CILCO has an incentive to sue, the *Illinois Brick* rule should apply to this case unless there is some other compelling reason to except it. None was offered by the Seventh Circuit. In fact, there is a very good reason not to except this case: in the event of a recovery, suit by CILCO would more effectively compensate consumers than would a *parens patriae* or class action suit.

In a *parens patriae* or class action context, difficult problems would be presented with regard to the distribution of the recovery. The relevant statute states:

> Monetary relief recovered in [a parens patriae action] shall—
>
> (1) be distributed in such manner as the district court in its discretion may authorize; or
>
> (2) be deemed a civil penalty by the court and deposited with the State as general revenues;
>
> subject in either case to the requirement that any distribution procedure adopted afford each person a reasonable opportunity to secure his appropriate portion of the net monetary relief.

15 U.S.C. § 15e (1982). Each of the available alternatives is undesirable. If the State attempted to distribute the recovery itself, it would be necessary to implement cumbersome, expensive procedures that would have only limited effectiveness because few consumers would still possess all of their monthly billing statements. If the district court ordered Petitioner to lower its prices to compensate the consumers, there would be undesirable side effects such as windfalls for those who had not been injured. *See* Comment, *Parens Patriae Antitrust Actions for Treble Damages,* 14 Harv. J. on Legis. 328, 355 (1977). In addition, such an order would conflict with FERC regulation. The final possibility, use of a civil penalty, is also undesirable because it would allocate the recovery to the entire population of Illinois, most of which is not served by CILCO or Petitioner. *See id.* at 356.

By contrast, if CILCO recovered damages from Petitioner, distribution of the recovery would be simple and effective. The Commission could allocate the damage award through an administrative proceeding. The Commission could determine the extent to which CILCO's recovery is attributable to its own losses (*e.g.*, because of lower earnings) and the extent to which CILCO's recovery is attributable to costs that were passed on to consumers. With regard to the latter, the Commission could order refunds to the customers who bore the alleged overcharge. CILCO possesses the necessary information and mechanisms to effectuate such an order at a minimal cost. Indeed, such procedures have been used on numerous occasions in cases involving public utilities. *See, e.g., Offshore Construction Costs of Natural Gas Pipelines,* 25 F.E.R.C. ¶ 61,011 (1983) (approving

a settlement agreement under which various interstate pipeline companies flowed through an antitrust recovery to their customers).

In sum, to the extent any recovery is warranted by CILCO, consumers would be more effectively able to recover any overcharges through CILCO than they would through a recovery by the State of Illinois as *parens patriae* or class representative. The Seventh Circuit thus erred not only by assuming that CILCO would not seek a recovery for the consumers, but also by failing to recognize the superiority of an action by CILCO as a means of compensating the consumers.

The Seventh Circuit's decision undermines the fair and uniform application of the antitrust laws and engenders uncertainty for companies subject to suit in many circuits, since the Seventh Circuit permits utility customers and the utility itself to pursue a pipeline while other circuits do not. The risk of disparate treatment is real. Moreover, the decision completely disrupts the pipeline's ability to identify an appropriate party in the dispute for purposes of achieving settlement.

IV

CONCLUSION

For the foregoing reasons, the Interstate Natural Gas Association of America urges this Court to grant the Petition for Writ of Certiorari to review the *en banc* decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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DATED: November 15, 1988